

Tort Law in America at the Beginning of the 21st Century

Vincent R. Johnson

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I. Sweeping Transformation

The twentieth century was a time of great change for tort law<sup>①</sup> in

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① See Vincent R. Johnson and Alan Gunn, *Studies in American Tort Law* 3 (2d ed. 1999):

In general, tort law is a vehicle of legal redress for victims of physical injury or damage to tangible property. It also, on occasion, provides compensation or other relief for such diverse forms of harm as mental distress, impairment of reputation, and non-tangible economic injuries.

The disputes which fall within the bounds of tortlaw are as broad as the range of human

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America. At the beginning of the 1900s, victims of physical injury and property damage were afforded little in the way of redress.<sup>①</sup> Under a variety of legal doctrines-some of which were almost stunning in their severity<sup>②</sup>-tort plaintiffs were routinely denied recov-

(接上页注①) activities.... [E] very person whose conduct or inaction precipitates a result which another perceives as harmful is a potential tort defendant.

Tort law encompasses many distinct causes of action-including, for example, claims for defamation, invasion of privacy, negligence, and false imprisonment, to mention but a few. Some torts (such as trespass to land) are ancient in origin, while others (such as strict products liability) have emerged only recently; a number of actions (for example, deceit) are well-defined and consistently recognized, though others (for example, wrongful birth and wrongful life) are only loosely understood or are the subject of little consensus.

New torts are constantly being elevated to legal status as ideas change concerning the duties persons owe to one another....

① Twentieth century changes in tort doctrine were accompanied by-perhaps caused by-changes in views about injury compensation. See G. Edward White, *Tort Law in America* xv. (1980) ("The attitudes of educated Americans toward injuries have changed dramatically over the past hundred years. A widespread attitude which associated injury with bad luck or deficiencies in character has gradually been replaced by one which presumes that most injured persons are entitled to compensation, through the legal system or some other mechanism")

② For example, at the beginning of the century, the no-duty-to-rescue rule was so firmly implanted in American tort jurisprudence that the Supreme Court of Kansas could bluntly state, in holding that a railroad was not liable for failing to render aid to a trespasser whom its train had run over:

With the humane side of the question courts are not concerned. It is the omission or negligent discharge of legal duties only which come within the sphere of judicial cognizance.... The moral law would obligate an attempt to rescue a person in a perilous position-as a drowning child-but the law of the land does not require it...

*Union Pacific v. Cappier*, 72 P. 281, 282. (Kan. 1903)

ery by American courts. No-duty rules<sup>①</sup>, harsh defenses<sup>②</sup>, and a wide range of immunities<sup>③</sup> conspired to deprive injured persons of

① Illustratively, possessors of land ordinarily had no duty to protect trespassers on their property from foreseeable harm, no matter how easily they might do so. See *Restatement, Second, of Torts* 333 (1965). Likewise, public entities, such as police and fire departments had no duty to protect individual citizens from harm caused by negligent failure to perform official duties, such as failure to respond to a crisis. See *Riss v. City of New York*, 293 N. Y. S. 2d 897. (N. Y. 1968) (city was not liable where the police did nothing after learning that a woman was threatened with serious physical harm-a threat which was later carried out)

② For example, under the classic rule of contributory negligence any carelessness on the part of the plaintiff was a total bar to an action based on negligence. Assumption of the risk-meaning voluntary confrontation of a known danger-was a total bar to actions based on recklessness, negligence, and strict liability. The fellow-servant rule held that notwithstanding the usual rules under which an employee is ordinarily held liable for the torts of an employee occurring within the scope of employment, an employer was not liable for harm to an employee which resulted from the conduct of a fellow worker. The late William L. Prosser, once the leading scholar on American tort law, described contributory negligence, assumption of the risk, and the fellow-servant rule as the "three wicked sisters of the common law." W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, & David G. Owen, *Prosser and Keeton on Torts* 573. (5th ed. 1984)

③ See At the beginning of the twentieth century:

[S]overeign immunity precluded suits against the government; spousal immunity forbade claims between spouses; parental immunity prevented suits by children against parents; and charitable immunity foreclosed actions against charities. For varying reasons, these kinds of litigation were viewed as detrimental to the common good.

Since around 1940, there has been a marked trend toward abrogating immunities in whole or in part, on the theory that, except in extraordinary circumstances, persons should be held accountable for the harm they tortiously cause.

Vincent R. Johnson and Alan Gunn, *Studies in American Tort Law* 27. (2d ed. 1999)

most opportunities to secure compensation. The prevailing rules protected the interests of business, the process of industrialization, and the pursuit of commercial progress by denying relief to the unfortunate individuals harmed by dangerous machines, defective products, and unsafe practices.

Over the course of the twentieth century, the legal landscape of American tort law was thoroughly transformed. Slowly but inexorably, virtually every feature of the American tort system was examined and reshaped. No-duty rules were eviscerated with exceptions<sup>①</sup> and sometimes jettisoned entirely.<sup>②</sup> Defenses which once totally barred recovery were modified in accordance with comparative principles so that in a wide range of cases at least partial recovery is permitted, even if the plaintiff has engaged in some form of misconduct.<sup>③</sup> Immunities excusing certain classes of persons and institutions from the obligation to exercise care have been widely

① For example, with regard to the no-duty-to-rescue rule, "courts have increased the instances in which affirmative duties are imposed not by direct rejection of the common law rule, but by expanding the list of special relationships which will justify departure from that rule." *Soldano v. Daniels*, 190 Cal. Rptr. 310, 313. (Ct. App. 1983)

② See e. g., *Rowland v. Christian*, 443 P. 2d 561 (Cal. 1968) (abrogating the limited-duty categories applicable to premises liability litigation and substituting a duty of reasonable care under the circumstances); *Tarasoff v. Regents of the Univ. of Calif.*, 551 P. 2d 334 (Cal. 1976) (making psychotherapists liable for unreasonable failure to protect others from foreseeable harm caused by patients); *Kelly v. Gwinnell*, 476 A. 2d 1219. (N. J. 1984) (holding that a social host who serves alcohol to a visibly intoxicated guest may be held liable to persons harmed by the guest's drunk driving upon leaving the premises)

③ See e. g., *Hilen v. Hays*, 673 S. W. 2d 713. (Ky. 1984) (adopting pure comparative negligence under which negligence on the part of the plaintiff will not bar recovery, but merely reduce the damages awarded in a negligence case in proportion to the plaintiff's contributory negligence)

abrogated, in whole or in part.<sup>①</sup> Today, at the beginning of the 21st century, the general rule in American tort law is that all persons are obliged to exercise reasonable care to avoid foreseeable harm to others. Doctrinal departures from this basic principle are viewed with considerable skepticism.

In addition to the widespread availability of a cause of action for negligence (failure to exercise care), in a few narrow but important areas—notably cases involving harm caused by defective products—strict liability is imposed.<sup>②</sup> Thus, if a defective product harms a consumer, the seller is held liable, regardless of why the product was defective.<sup>③</sup> There is no need to prove that the seller was careless.<sup>④</sup> All that the plaintiff must show is that the product was defective (for whatever reason) and that the defect caused harm to the plaintiff. This means, for all practical purposes, that every product sold in America today comes with insurance against harm caused by defects—namely, the right to recover for resulting injuries under principles of strict liability, if not under ordinary negligence standards.

① See note 6 supra.

② See generally Restatement, Third, of Torts: Products Liability. (1998)

③ Although a new Restatement of the law on products liability was recently adopted by the American Law Institute (see note 11 supra), the law in most states is based on its predecessor. See Restatement, Second, of Torts § 402A. (1965) (stating that "One who sells any product in a defective condition . . . is subject to liability . . . [even though he] 'has exercised all possible care in the preparation and sale of his product'")

④ See *Beshada v. Johns-Manville Products Corp.*, 447 A. 2d 539, 546. (N. J. 1982) ("in strict liability cases, culpability is irrelevant. . . Strict liability focuses on the product, not the fault of the manufacturer")

## II . Deterring Losses

The rules of tort law have deterrent force. Properly framed and applied, they minimize the likelihood of accidents by forcing persons who elect to undertake risky forms of conduct to internalize many of the costs of the injuries such conduct causes. As a result, persons are both discouraged from engaging in unnecessary injury-producing activities and encouraged to take safety precautions, if such activities, despite their risks, are nevertheless pursued.<sup>①</sup>

By way of deterrence, the expansion of tort liability in America during the twentieth century has had a tremendous impact on what persons and institutions do. Although some argue that the threat of liability has chilled inventiveness and deprived Americans (and the world) of valuable products<sup>②</sup>, the shelves of American stores are far from bare. Indeed, Americans, like persons in many other countries, choose from a wider range of products than ever before. More importantly, the products that are sold in the United States are for the most part safe, in large measure because the fear of liabil-

① See Vincent R. Johnson and Alan Gunn, *Studies in American Tort Law* 622-23. (2d ed. 1999) (discussing how negligence and strict liability affect activity levels and safety precautions)

② See Peter W. Huber, *Liability: The Legal Revolution and Its Consequences* 5-7 (1988) (criticizing the reformulation of American tort law which began at mid-century with the efforts of academics and judges and ultimately "changed the common law as profoundly as it had ever been changed before"), reviewed in Vincent R. Johnson, *Liberating Progress and the Free Market from the Specter of Tort Liability*, 83 NW. U. L. REV. 1026, 1045. (1989)

ity creates an incentive for safety. As a result, American tort law has contributed significantly to a rather remarkable state of affairs. Today in America, products are made and activities are conducted in a way that greatly minimizes the risk of accidental harm. At the same time, persons who nevertheless suffer injury have a fair chance of obtaining compensation through the legal system so that they may put their lives back together and move on, as best possible.

## III . Financing Legal Services

A cornerstone of the American tort system is the contingent fee contract. This arrangement for financing legal services enables anyone who is seriously injured and has a plausibly meritorious claim to obtain a lawyer-often a very good lawyer-even if that person has no money to pay for representation.

A contingent fee contract gives a lawyer a financial interest in the client's case that is dependent upon its success. If the lawyer wins the case and recovers money for the client, the lawyer gets to keep a percentage of the recovery-often something on the order of 30 to 35%, depending on the terms of the contract.<sup>①</sup> In contrast, if

① See Samuel R. Gross, *We Could Pass a Law . . . What Might Happen if Contingent Legal Fees Were Banned*, 47 DePaul L. Rev. 321, 321. (1998) [ "the archetypal American contingent legal fee is a thirty-three percent commission that a plaintiff's lawyer collects from the proceeds of the claims she handles. Sometimes the percentage is higher or lower; often it varies depending on the stage at which recovery is obtained (e. g. , thirty-three percent of a settlement before the pre-trial conference, forty percent of a judgment or a settlement after the pre-trial conference)"]

the case is unsuccessful and the client recovers nothing, the lawyer receives no payment for the services rendered. Thus, if the client wins, the lawyer wins; if the client loses, the lawyer loses. Needless to say, a lawyer whose fee is contingent on success has an incentive to work hard, for if the client does not prevail, the lawyer is denied compensation for the work performed.

The contingent fee arrangement provides not only a device for financing legal services, but a mechanism for screening the merits of potential claims. A lawyer ordinarily will be unwilling to accept a contingent fee for working on a case that lacks merit. Only suits that have a reasonable basis in law and in fact are likely to be undertaken on such terms. Consequently, contingent fees help to ensure both that meritorious cases reach the courts and that legally or factually frivolous claims do not.

Although it is possible, and sometimes desirable<sup>①</sup>, for a lawyer and client to agree to a different form of fee arrangement, virtually all plaintiffs in American tort litigation are represented on a contingent fee basis.<sup>②</sup> In contrast, the defendants in tort actions typically pay their lawyers by the hour for the services they perform. Hourly

① Cf. Berry Meier and Richard A. Oppel Jr., *States' Big Suits Against Industry Bring Battle on Contingency Fees*, N. Y. Times, Oct. 15, 1999, at A1, col. 6. (discussing controversy over whether contingent fees are appropriate in cases where outside lawyers represent cities and states in suits against the makers of products such as cigarettes, guns, and lead paint, which may produce enormous settlements and consequently very large contingent fees, sometimes in the billions of dollars)

② See Gross, *supra* note 16, at 321.

billing, like contingent fees, creates an incentive for thoroughness in the preparation of a case. The more hours worked, the greater the fee earned by the lawyer. So long as the defendant (or the defendant's insurance company) is willing to pay the bill, there is little reason for a lawyer to forego steps which reasonably should be undertaken for the purpose of mounting a robust defense.

Consequently, as presently structured, the financing of attorneys' fees in the American tort system tends to ensure that the claims decided in litigation are thoroughly investigated, well prepared, and vigorously asserted.<sup>①</sup> That, of course, is appropriate in the American adversarial system of justice, which depends for its success on the clash of competing interests as a vehicle for learning the truth about the facts and fairly resolving claims.<sup>②</sup>

#### IV. Turning Back the Clock

Many persons are unhappy with the present state of the Ameri-

① Of course, reality sometimes falls short of these goals. It is possible, for example, for a personal injury attorney working on a contingent fee basis to generate a high income based on sheer volume of clients, rather than diligence and hard work in particular cases. This problem has been exasperated by the advent of lawyer advertising, which since 1977 has been constitutional. See *Bates v. Arizona State Bar*, 433 U. S. 350. (1977) (holding that advertising of the cost and availability of routine legal services is protected by the First Amendment to the United States Constitution)

② See William Burnham, *Introduction to the Law and Legal System of the United States* 78-83. (2d. ed. 1999) (discussing the characteristics and rationale of the adversary system)

can tort system. A regime which makes it possible for the injured to have their day in court threatens the *status quo*, the established way of doing business. If some persons have a fair shot of prevailing on a tort claim, then others stand to lose. The persons with the most to lose are often those whose affairs affect, and potentially cause harm to, the greatest number of persons. Not surprisingly, businesses and other institutions often feel threatened by contemporary American tort law.

Over the last twenty or so years, potential tort defendants have sought, in a variety of ways, to undo the twentieth century plaintiffs' revolution in tort law. These efforts to "re-form" the American law of torts have met with varying degrees of success. At a minimum, it is fair to say that the reform efforts have been so frequent and so aggressive that it is plausible that they might ultimately succeed to a large measure in "turning back the clock" to a time when American tort plaintiffs were often denied adequate compensation for injuries and when tort law did little to create incentives for safety.

### 1. Swaying the Attitudes of Jurors

In the American tort system, disputed questions of fact are decided by laypersons, rather than by judges or other professionals.<sup>①</sup> These laypersons are gathered from the community through a largely

① See William Burnham, Introduction to the Law and Legal System of the United States 83-88. (2d ed. 1999) (discussing American juries and contrasting American jurors with European "Continental lay judges ... [who] are ... generally screened for service rather than being randomly selected from the population at large")

random process<sup>①</sup> to hear the evidence in a case. After the case is over, these persons return to their jobs, and most are unlikely to serve on a jury ever again.<sup>②</sup>

As members of a jury, a group normally consisting of twelve persons, lay jurors decide disputed questions of fact. If there is conflicting evidence, and reasonable minds can differ as to who should be believed, it is up to the jury to decide what in fact occurred. For example, if there is evidence tending both ways, the jury will determine whether the defendant's car was in the wrong lane, or was traveling too fast, at the time the auto accident occurred.

In tort cases, juries also decide questions relating to the standard of care.<sup>③</sup> For example, the law of negligence states that a person must exercise reasonable care, but it is normally up to the jury to decide whether the defendant, at the time of the accident, acted as a

① In some states, potential jurors are drawn from the list of persons licensed to drive motor vehicles. On a given day, hundreds of these persons, whose names are chosen randomly, are called to the courthouse for jury service. A panel with perhaps as many as forty or fifty potential jurors on it will be assigned to one of the courts. The attorneys in the case are allowed to briefly question the potential jurors by asking relevant questions, for example, who the jurors work for or whether they are related to any of the parties. The attorneys are then permitted to request that persons be excluded from the jury in cases of "good cause" (such as ownership of an equity interest in an entity that is party to the litigation) and, in a limited number of instances, without stated reasons. After ruling on such challenges, a jury, normally consisting of twelve persons, is impaneled from those who are not excused from service. The persons not seated on the jury may be either assigned to another court as potential jurors in a different case or allowed to go home.

② Jury service is relatively rare. I have served on one jury. Neither my wife, my parents, or my two brothers have ever served on a jury.

③ See Restatement, Second, of Torts 285 Cmt. g. (1965) (discussing the function of a jury in a tort case)

reasonable person would have acted in the same or similar circumstances. Naturally, there is a good deal of discretion in the decision-making process. Realistically, jurors are influenced by not only the evidence adduced in court, but by their predispositions concerning whether injured persons deserve compensation and whether the legal system operates fairly. In this respect, the jurors' beliefs about the legitimacy of the litigation process may color the jury's determinations about what the facts were and about whether legal standards were violated.

Recognizing that juries play a key role in the functioning of the American tort system, tort reformers aligned with the insurance defense bar have waged a fierce battle in recent years for the hearts and minds of potential jurors. The most visible evidence of this ongoing public relations campaign are the billboard "wars" that have raged along the highways in some of America's largest cities. In some metropolitan areas, it is virtually impossible for potential jurors to reach the courthouse for jury duty without driving past one or more huge signs intended to sway their attitudes about lawsuits. They often see these larger-than-life advertisements once or more a day, for months at a time.

One billboard advertisement that was ubiquitous in major Texas cities during the 1990s read: "Lawsuit Abuse: We All Pay, We All Lose!" Sponsored by a defense-oriented group styling itself as "Citizens Against Lawsuit Abuse," the advertisements sought to plant in the minds of potential jurors the idea that many lawsuits are frivolous and that when money is paid out for fraudulent or trivial tort claims, "we all pay, we all lose." The plaintiffs' bar has been

slow to respond to such defense-oriented advertisements, and their efforts have been less than successful.<sup>①</sup> It is easier to attack the American tort system with the language of pithy sound-bites, than to defend the system's complexities with similar brevity.

It is difficult to say what effect high-profile public relations campaigns have had on the ability of plaintiffs with meritorious claims to collect for their injuries. The anecdotal evidence suggests that such advertising has been a significant factor in reducing the size, frequency, and adequacy of damages awards in tort cases.<sup>②</sup> In a suit litigated during the mid-1990s in San Antonio, Texas, the nation's eighth largest city, fifty prospective jurors were asked whether they had seen highway billboards complaining about lawsuit abuse. Forty-nine of the fifty persons reported that they had.<sup>③</sup> At the very least, lawsuit-abuse advertising has succeeded in capturing the attention of potential jurors. One consequence of the public rela-

① In Houston, one billboard ad sponsored by the plaintiffs' bar read, "Prisons are for Common Criminals, Punitive Damages are for Corporate Criminals." Presumably, the idea was to taint corporate wrongdoing with an air of criminality and to persuade potential jurors that in tort cases awards of punitive damages, in addition to compensatory damages, are often appropriate. Another billboard ad in Corpus Christi, Texas, asked bluntly: "Is Citizens Against Lawsuit Abuse Racist?" The ad apparently sought to capitalize on the idea that denial of tort compensation can be a form of discrimination against minorities.

② Cf. Milo Geyelin, *Far Fewer Plaintiffs Are Winning Product-Liability Lawsuits Now*, Wall St. J., July 12, 1994, at B9, available in Westlaw at 1994 WL-WSJ 334983. (noting that business groups maintain that damage awards are still too high, but agree there has been a noticeable pro-defense shift in juror attitudes)

③ I was one of the 50 potential jurors called in that case and my reaction was the person who had not seen the lawsuit abuse advertising was so unobservant that I would not want him on my jury if I were a litigant.



tions battles and other initiatives relating to the tort system is that the news media frequently reports on such issues. The phrase "tort reform" so frequently appears in public media that persons, who just a few years ago had no idea what a "tort" was, now willingly express opinions on alleged lawsuit abuse and the necessity of reforming tort law.<sup>①</sup>

The recent public relations campaigns to influence the attitudes of American jurors are just one indication of the efforts that are being made in some quarters to "turn back the clock" to a time when tort law was more generous to potential defendants. Because large-scale public relation activities are expensive, these campaigns also suggest the tremendous stakes that underlie the battle over tort reform.

## 2. Tort-Reform Legislation

Tort law in the United States was once almost exclusively the province of the courts.<sup>②</sup> The law was made, applied, and revised primarily by judges incidental to the process of ruling on the disputes that came before them. Because of the American tradition of an in-

① Cf. Editorial, Review & Outlook: The Lawyers' Party, Wall. St. J., Oct. 5, 1999, at A26, available in Westlaw, 1999 WL-WSJ 24916515:

In a collection of short essays, "250 Ways to Make America Better," put out by George magazine, apolitical figures Martina Navratilova and Rapper Ice T dedicate theirs to tort reform. Ms. Navratilova: "The loser of a lawsuit should pay the legal fees. These days, as soon as a person feels slighted or injured (physically or emotionally), they look for someone to sue. . . . The hope is not to win, but for the quick \$ 50, 000 — because it's cheaper to settle than to fight."

② See Percy H. Winfield, The Foundations of Liability in Tort, 27 Colum. L. Rev. 1, 4-5. (1927) (discussing Anglo-American tort jurisprudence)

dependent judiciary,<sup>①</sup> this meant that the legislative and executive branches of government played only a minor role in shaping tort rules and remedies

However, the twentieth century in America saw the rise of statutory law making.<sup>②</sup> So effective have been legislative assertions of law-giving powers that today most Americans think of legislatures as the primary, if not the exclusive, source of legal rules. Persons with a short-term view of Anglo-American history decry law making by the courts as unwarranted judicial activism, although that process has been underway for almost a thousand years, "since not long after William defeated Harold at the Battle of Hastings in 1066."<sup>③</sup> While tort law, in many respects, is still a "common-law" field (meaning that judges continue to make and revise the law), it is equally true that over the last hundred years American legislatures have assumed an increasingly greater role in defining the law of torts.

① The Chief Justice of the United States, William H. Rehnquist, has argued that an independent judiciary is the unique American contribution to the theory and practice of government. See Address by Chief Justice William H. Rehnquist, Northern Illinois University School of Law, DeKalb, Illinois 2 (Oct. 20, 1988). Regarding the importance of judicial independence, see also Vincent Robert Johnson, The French Declaration of the Rights of Man and Citizens of 1789, The Reign of Terror, and the Revolutionary Tribunal of Paris, 13 Boston Coll. Int'l and Comp. L. Rev. 1, 14-24. (1990) (discussing the absence of an independent judiciary to protect individual rights during the French revolution)

② See Guido Calabresi, A Common Law for the Age of Statutes 1 (1982) ("statutes, enacted by legislatures, have become the primary source of law"); Ellen Ash Peters, Common Law Judging in a Statutory World, 43 U. Pitt. L. Rev. 995, 1008. (1982) (discussing the public's expectation that problems will be solved legislatively)

③ Vincent R. Johnson and Alan Gunn, Studies in American Tort Law 3. (2d ed. 1999)

In view of the growing "statutorification" of American tort law, one would expect that those seeking to make the law of torts more defense-oriented would plead their cause before the legislatures. That is precisely what has occurred. Legislative proposals relating to "tort reform" are now ubiquitous. During the past quarter century, wave after wave of reform legislation has been debated by legislators, and many bills have been enacted. These reform statutes have often addressed procedural and remedial issues in the law of torts. For example, statutes have "capped" or limited awards of certain types of damages<sup>①</sup>, shortened or otherwise made more stringent statutes of limitations<sup>②</sup>, modified the collateral source rule<sup>③</sup>, or imposed

① See *Fein v. Permanente Medical Group*, 695 P. 2d 665 (Cal. 1995) (upholding a \$250,000 cap on non-economic damages in a medical malpractice case); Conn. Gen. Stat. Ann. 52-240b. (1993) (limiting punitive damages to twice the compensatory award in a products liability action)

② See *Goldsmith v. Howmedia, Inc.*, 491 N. E. 2d 1097. (N. Y. 1986) (discussing a statute, enacted in response to complaints about large medical malpractice verdicts, which barred some malpractice claims before they even arose, as where a doctor's negligence causes no harm to the plaintiff for several years)

③ I have written elsewhere that:

The collateral-source rule holds that a plaintiff's recovery from the defendant shall not be diminished because the plaintiff has received benefits covering some aspect of damages from a person other than the defendant or one acting on the defendant's behalf (or from a joint tortfeasor or one who believes himself to be a joint tortfeasor). Thus, the fact that the plaintiff has been compensated by personal medical insurance, has been taken care of free of charge by a veterans' hospital, or has received gratuitous nursing services from a spouse or neighbor is not taken into account. The reason is that such amounts are normally the result of the plaintiff's own hard work or foresight, or at least are a gift to the plaintiff, rather than to the defendant.

Vincent R. Johnson, *Mastering Torts* 58. (2d ed. 1999)

In the 1970s several jurisdictions abolished ... [the collateral source rule] by statute in medical malpractice cases; in the 1980s a larger number abolished it (again by statute) in all tort claims. In these jurisdictions, past and prospective insurance benefits paid or payable to the plaintiff are offset against the plaintiff's recovery.

preconditions to litigation.<sup>①</sup> However, other tort reform legislation has gone much further and addressed issues of a substantive variety. For example, some statutes exempt certain classes of persons and institutions from liability for ordinary negligence.<sup>②</sup>

In many cases, tort reform has been justified on the ground that existing rules led to a "crisis" in a particular field of endeavor by imposing liability so readily and extensively that rising costs from lawsuits threatened to make products or services in the field unavailable. Scholars are divided as to whether these "crises" have been real or merely perceived. The dubious have argued that tort reform has been the product not so much of crisis management by legislators, but of legislative deference to well-funded special interest groups that have the ability to influence the legislative electoral process through campaign contributions.

Whatever the cause of legislative tort reform, it is clear that many courts resist statutory encroachments into what was once largely the domain

(接上页注③) Kenneth S. Abraham, *What Is a Tort Claim?: An Interpretation of Contemporary Tort Reform*, 51 Md. L. Rev. 172, 190-191 (1992). At least, "25 jurisdictions have now enacted some form of legislation governing the collateral source rule." *Id.* at 191 n. 51.

① For example, a recent statute in Texas restricts the assignability of malpractice claims, imposes a \$500,000 cap on noneconomic damages, changes the standard of proof to "clear and convincing" evidence, and requires plaintiffs to either submit an expert report within 90 days of filing suit or post a \$5000 bond under penalty of sanctions against the plaintiff. Tex. Rev. Civ. Stat. 11.02, 13.01, and 13.02. (1995)

② For example, Recreational Use Statutes have been passed in many jurisdictions. The California law provides that

An owner of ... real property ... owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except [under the limited terms of the statute]. Calif. Civ. Code 846 (West 1982 & Supp. 1998).

of the judiciary. Tort reform statutes are always challenged in the courts. While many laws have survived judicial review, numerous others have been declared invalid. Courts frequently rely upon their constitutional powers to overrule tort reform legislation. Reflecting on tort law during the closing years of the twentieth century, scholars have remarked that "[n]ever before have state constitutional provisions been used on so grand a scale to overturn state legislative policy decisions."<sup>①</sup>

There is no end in sight to legislative tort reform, nor to the challenging of such laws on constitutional grounds. The continuing struggle over whether legislatures will have the last word in defining the law of torts is one more indicia of the deep struggle currently being waged over the terms and availability of accident compensation for tort victims in America.

### 3. Attacks on the Contingent Fee System

No reform proposals have so threatened the viability of the current tort system as recent efforts to curtail the use of contingent fees.<sup>②</sup> Proponents

① Victor E. Schwartz, Mark A. Behrens, and Mark D. Taylor, *Who Should Make America's Tort Law: Courts or Legislatures?*, at 2-15. (Wash. Legal Found. 1997) ("scholars have hailed this development as one of the most important... occurrences in the development of tort law in the past fifty years"). The authors counted at least sixty state court decisions during roughly a decade which used state constitutional provisions to nullify state legislative tort reform. *Id.*

② A proposal endorsed by the Manhattan Institute, a conservative think tank, would bar personal injury lawyers from charging their standard contingent fee on the portion of any ultimate recovery which the defendant had offered in settlement proposals before or shortly after the lawyer was retained. Lester Brickman, Michael Horowitz & Jeffrey O'Connell, *Rethinking Contingency Fees* (Manhattan Inst. Monograph Series No. 1, 1994); Michael Horowitz, *Making Ethics Real, Making Ethics Work: A Proposal for Contingency Fee Reform*, 44 Emory L. J. 173 (1995); Jeffrey O'Connell, *Early Offers as Contingent Fee Reform*, 47 DePaul L. Rev. 413, 418-19 (1998). The Manhattan Institute proposal calls for:

legislation or judicial rules that require plaintiff's personal injury lawyers to solicit early settle-

of such plans have rightly noted that contingent fee contracts sometimes produce exorbitant fees, particularly in class action litigation and cases involving catastrophic personal injuries. Yet abolishing or substantially limiting the use of contingent fees could surely mean that many individuals would be denied redress through the court system.<sup>①</sup> Few persons of ordinary means-let alone the poor-have the wherewithal to pay attorneys fees calculated on an hourly basis. The charge for a lawyer's time typically ranges between \$ 100 to

(接上页注②) ment offers before they would be eligible to charge their standard contingent fees against any part of the ultimate recovery. Under this proposal, early offers would not serve merely as useful information for the client in negotiating a contingent fee. Rather, amounts offered as settlements before the lawyer is retained, or after retention but within sixty days of the lawyer's mandatory solicitation, would be deemed not to be at risk, and thus not subject to the standard fee, even when the offers are rejected and withdrawn.

This scheme would impose a substantial administrative burden on the injury victim's lawyer, because early offer solicitations must include "the material facts relevant to the claim," such as the basis for claiming that the solicited party is responsible for the client's injury. Similarly, to ensure that claimants and their lawyers can meaningfully evaluate settlement offers, solicited parties who choose to make early offers must include any non-privileged materials relevant to the injury which they "relied on" in developing their offers....

Ted Schneyer, *Legal-Process Constraints on the Regulation of Lawyers' Contingent Fee Contracts*, 47 DePaul L. Rev. 371, 408-09. (1998)

A version of the Manhattan Institute proposal appeared as Proposition 202 on the California ballot in March 1996, but was defeated. See G. Pascal Zachary, *California's Defeat of Legal, Insurance Overhaul Raises Questions About Tort Reform Nationwide*, Wall St. J., Mar. 28, 1996, at A16, available in Westlaw at 1996 WL-WSJ 3096488 (discussing defeat of loser pays proposal relating to securities fraud). Some aspects of the proposal were incorporated into the Common Sense Product Liability Reform Act that President Clinton vetoed on May 2, 1996. See Angel Wennihan, *Let's Put the Contingency Back in the Contingent Fee*, 49 S. M. U. L. Rev. 1639, 1670-72. (1996)

① See Gross, *supra* note 16, at 345, predicting that if contingent fees were abolished:

[T] here would be a great decrease in the number of damage claims brought in court or in any forum. In addition to the effects that would have on the potential claimants and defendants, this decrease in litigation would have major repercussions for the legal profession and the legal system as a whole.

\$ 300 per hour. In the absence of contingent fees, few attorneys display any willingness to replace the common practice of hourly billing with some more affordable form of fee calculation.

At the moment, direct attacks on the contingent fee system have subsided. After the issue received much attention in the late 1980s and early 1990s, the powerful American Bar Association, in 1994, weighed in on the subject by issuing a widely noted ethics opinion.<sup>①</sup> The ABA took the position that contingent fees are ethically permissible, even in cases where the client could afford to pay under some other fee arrangement.

What has not subsided are equally threatening proposals to alter the "American rule" on attorneys fees, pursuant to which each side bears its own costs of legal representation.<sup>②</sup> Plans are frequently put forth to discard the American approach in favor of the "English rule,"<sup>③</sup> the "loser pays" principle.<sup>④</sup> Under that approach, the loser in litigation must pay the

① See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94 - 389. (1994) (refusing to declare unethical the common practice among personal injury lawyers of charging standard contingent fees rather than basing each fee on a customized estimate of the odds of gaining a recovery, the likely amount of the recovery, and the effort the case is likely to require)

② Edward F. Sherman, From "Loser Pays" to Modified Offer of Judgement Rules: Reconciling Incentives to Settle with Access to Justice, 76 Texas L. Rev. 1863, 1863. (1998) ("The 'American rule' that parties will bear the cost of their own attorneys' fees in litigation, whether or not they win or lose, has a long pedigree going back to the earliest days of our republic")

③ See Sherman, *supra* note 42, at 1863. (noting that the "English rule" is followed in Great Britain and most European nations)

④ See Thomas D. Rowe, Jr., Indemnity or Compensation?: The Contract with America, Loser-Pays Attorney Fee Shifting, and a One-Way Alternative, 37 Washburn L. J. 317 (1998) (discussing fee-shifting proposals); Gregory E. Maggs and Michael D. Weiss, Progress on Attorneys Fees: Expanding the Loser-Pays Rule in Texas, 30 Hous. L. Rev. 1915, 1920. (1994) (noting that in the early 1990s, Former President Bush' s Council on Competitiveness promoted a general loser-pays rule for the federal courts)

winner' s attorneys fees. Needless to say, if most persons cannot afford to pay the fees of their own lawyer, except on a contingent basis, those same persons, when unsuccessful in litigation, can hardly afford to pay the fees charged by their opponent' s attorney. The adoption of a loser-pays rule would have a tremendous impact on the operation of the tort system. Rather than risk incurring liability for the fees of one' s opponent, many persons would simply forego bringing claims, at least in the large range of cases in which the issue of liability is less than perfectly clear.<sup>①</sup>

Loser-pays proposals continue to be a common element in tort reform legislation.<sup>②</sup> So far these proposals have been essentially unsuccessful. However, with the continuing hew and cry against frivolous litigation and lawsuit abuse, the loser-pays idea is unlikely to go away.<sup>③</sup> These proposals, and others relating to contingent fees, are additional examples of the on-going debate over how readily relief through the courts should be available to tort victims.

#### 4. Federalization of Tort Law

In the American federal system, tort law is generally a creature of the state, rather than the national, government. States are free to define the terms under which individuals will be compensated for personal injury or property damage. Typically, state power in such matters is only lightly con-

① See Francis J. Carney, "Loser Pays" - Justice for the Poorest and the Richest, Others Need Not Apply, 8-May Utah B. J. 18. (1995) (discussing the English Rule from the perspective of an American woman who litigated a death claim in England)

② See Sherman, *supra* note 42, at 1866 - 67. (discussing repeated Congressional consideration of related proposals)

③ See generally Walter Olson and David Bernstein, Loser-Pays: Where Next?, 55 Md. L. Rev. 1161, 1186. (1996) (predicting that "legislative experiments with loser-pays will continue to spring up")

strained by the federal Constitution<sup>①</sup> or by preemption under federal law.<sup>②</sup> Because states do not always act in unison in addressing social problems, a persons' s rights under tort law often differ from one state to the next.

One consequence of America' s decentralized approach to the law of accident compensation is that states have room for experimentation with expanded forms of liability. Such innovation affects not only the state in question, but other jurisdictions as well. As one state experiments, others can watch and evaluate the results. The ability of states to learn from the experience of other jurisdictions contributes greatly to the overall health and vitality of the American tort system. It is also something of a liberating influence.

The adoption of new causes of action, and the discontinuance of previous doctrinal restrictions on recovery, is often opposed on the ground that the proposed change will "open the floodgates of litigation," thereby inun-

① In a few areas, the federal Constitution greatly constrains state tort law. For example, the First Amendment to the United States Constitution guarantees freedom of speech and freedom of the press. Thus, torts involving some form of communication of ideas face formidable First Amendment obstacles. Subsequent to the United States Supreme Court' s decision in *New York Times v. Sullivan*, 376 U. S. 254 (1964), the law of defamation has been entirely transformed to comply with the demands of the federal Constitution.

② See Vincent R. Johnson, *Mastering Torts* 190 (2d ed. 1999): In recent years, there has been much litigation about whether ... [torts] claims in specific contexts are pre-empted by federal laws regulating those fields. It is not possible to generalize about when a claim will be pre-empted, other than to say that there is no preemption unless the purpose of Congress to achieve that result is clear and manifest. In each case, the analysis is highly fact specific, and the decision turns upon a careful reading of the language of the legislation and the legislative history behind the enactment. An intent on the part of Congress to pre-empt state tort law may be explicitly stated in the statute' s language or implicitly contained in its structure and purpose. The provisions of the law must be construed in light of a presumption against the preemption of state police-power regulations.

See also *Cipollone v. Liggett Group, Inc.*, 505 U. S. 504. (1992)

dating the courts with a multitude of suits too great to handle and imposing on defendants crushing liability. There is plausible merit to these arguments in view of the fact that the judiciary is the least well-funded branch of American government. The resources available for staffing, courtrooms, and the like are limited. Private resources-whether devoted to accident compensation or other goals-are likewise finite.

However, the history of American tort law during the twentieth century has shown that "floodgates" arguments and "crushing burden" arguments are often exaggerated. In this respect, the decentralized nature of the tort law has spurred change by debunking exaggeration. It is difficult to accept the contention that the courts or particular lines of endeavor will be pressed beyond the breaking point by a proposed change in the law if one can look to the experience of other states where that change has occurred and not produced the predicted calamity. That is precisely what many American courts did during the revolution in American tort law that expanded tort liability during the twentieth century.<sup>①</sup> As individual states experi-

① Cf. *Riss v. City of New York*, 293 N. Y. S. 2d 897 (N. Y. 1968). In arguing that the public-duty rule, which exempts a police department from liability based on failure to respond to an emergency call, should be abolished, Judge Keating wrote:

The foremost justification repeatedly urged for the existing rule is the claim that the State and the municipalities will be exposed to limitless liability. . .

The fear of financial disaster is a myth. The same argument was made a generation ago in opposition to proposals that the State waive its defense of "sovereign immunity." The prophecy proved false then, and it would now. . . No municipality has gone bankrupt because it has had to respond in damages when a policeman causes injury through carelessly driving a police car or in the thousands of other situations where . . . the State and its subdivisions have been held liable for the tortious conduct of their employees.

Id. at 901.

mented with the abrogation of traditional immunities and the relaxation of no-duty rules, other states, seeing that the results were not catastrophic, followed suit.

Of course, the decentralization of American tort law also has its costs, particularly with respect to mass-marketed products. If a defective product is sold and used in fifty states, lawsuits may be brought in any of those jurisdictions. A manufacturer seeking to protect itself full from liability must comply with the terms of tort law in every state where the product is sold. As a practical matter, this often means that a manufacturer will find itself compelled to adhere to the most demanding standards, those imposed by the most plaintiff-friendly of the many states.

Not surprisingly, those who feel aggrieved by the current state of American tort law have sought relief from the federal government, arguing that federal uniformity of the law, at least in some areas, will improve efficiency, reduce costs, and produce greater consistency in results. Tort reform proposals before Congress are now commonplace. The fiercest battles have related to attempts to pass of a proposed uniform law on products liability that would replace the existing patchwork of laws and decisions in the fifty states.<sup>①</sup> The enactment of such a law would do much to further the goals of legal simplicity and efficiency. But it would also make it easier for the reformers to restrict the availability of compensation to accident victims. That is, if products liability law were federalized, additional reforms could be achieved by addressing legislative proposals to one federal Congress. It is un-

① See generally Editorial: A Senate Mistrial, *Wall St. J.*, May 8, 1995, at A14, available in Westlaw at 1995 WL-WSJ 8709454. (noting that proponents of legal reform had been trying to bring a products liability bill to the Senate floor for 15 years, without success)

doubtedly easier to focus reform efforts to limit accident compensation on one federal legislature, than on fifty legislatures at the state level.

Reformers came tantalizingly close to enacting a federal products liability law in the 1990s, but a Presidential veto thwarted that effort.<sup>①</sup> In other areas, success in federalizing tort law has been achieved only at the margins. Congress has passed five minor pieces of federal tort reform legislation that have become law: the National Childhood Vaccine Injury Act of 1986<sup>②</sup>, the General Aviation Revitalization Act of 1994<sup>③</sup>, the Volunteer Protection Act of 1997<sup>④</sup>, Biomaterials Access Assurance Act of 1998<sup>⑤</sup>, and the Year 2000 Information and Readiness Disclosure Act.<sup>⑥</sup> The significance of these laws lies not so much in what they do as in what they symbolize: the propriety of federal solutions to tort problems.

There is little reason to expect that tort reformers will less frequently turn to Congress in the future as part of their efforts to restructure the law of torts. Indeed, such recourse would seem to be particularly likely if, unlike the case during the past twenty years, one political party gains control of both houses of Congress and the Presidency. The recent federalization of some minor areas of tort law, and the attempts to federalize the major field of product liability, are additional indicia of the on-going battle over

① See Hilary Stout, Clinton, as Expected, Vetoes Legislation To Curb Product-Liability Suit Awards, *Wall St. J.*, May 3, 1996, at B11, available in Westlaw at 1996 WL-WSJ 3101559. (discussing veto)

② 42 U. S. C. □□ 300aa-1 to 33. (1986)

③ 49 U. S. C. □40101. (Westlaw 1999)

④ 42 U. S. C. □14501-14505. (Westlaw 1999)

⑤ Pub. L. 105-230, Aug. 13, 1998, 112 Stat. 1519. (to be codified at 21 U. S. C. A. □1601)

⑥ Pub. L. 105-271, Oct. 19, 1998, 112 Stat. 2386.

how readily tort victims will be provided compensation through the tort system.

### 5. Judicial Activism

The twentieth century plaintiff's revolution in American tort law was achieved largely through judicial activism at the state level.<sup>①</sup> It is therefore not surprising that reformers to seek to undo those changes by resorting to the very same agents for change, state court judges.

During the last two decades of the twentieth century, many state courts, particularly at the highest levels, took a decidedly conservation turn. For example, in Texas, the nation's third largest state, the Supreme Court, which as late as the mid-1980s had been solidly pro-plaintiff, aligned itself unabashedly with the insurance defense bar.<sup>②</sup> In the process of swinging from one end of the jurisprudential spectrum to the other, the Texas Supreme Court abolished tort causes of action<sup>③</sup>, limited the role of juries<sup>④</sup>, and ruled in favor of defendants in a very high percentage of cases.<sup>⑤</sup>

In some states, judges on the highest court are appointed on the basis

① Huber, *supra* note 15, at 5-7.

② See Timothy D. Howell, *So Long "Sweetheart" -State Farm Fire & Casualty Co. v. Gandy Swings the Pendulum Further to the Right as the Latest in a Line of Setbacks for Texas Plaintiffs*, 29 St. Mary's L. J. 47, 52-60. (1997) (discussing the Texas Supreme Court's adoption of "decidedly defense-oriented stance" resulting in a "lopsided number of victories for defendants")

③ See, e. g., *Boyles v. Kerr*, 855 S. W. 2d 593. (Tex. 1993) (abolishing for most practical purposes the cause of action for negligent infliction of emotional distress)

④ 61 See Chief Justice Phil Hardberger, *Juries Under Siege*, 30 St. Mary's L. J. 1. (1998) (discussing decisions of the Texas Supreme Court)

⑤ See Mary Flood, *Court Gives Consumers Rare Wins*, Wall St. J., Jul. 8, 1998, at T1, available in Westlaw at 1998 WL-WSJ 3500746. (discussing rare plaintiff victory before the Texas Supreme Court)

of merit; in others, they are elected, sometimes on a partisan basis.<sup>①</sup> The election of judges risks unnecessarily politicizing the administration of justice, because judicial election campaigns cost money, and contributors to such races (almost exclusively lawyers) often expect something in exchange for their contributions other than mere judicial neutrality, independence, and good government.

In many states, raising money for judicial candidates is an integral component of plans for tort reform.<sup>②</sup> In some instances, huge amounts of money are poured into the process, with the hope of not merely influencing the outcome of the contest, but of shaping tort doctrine in years to come. These bitter partisan battles over judicial selection are one more indicator of the current struggle over the terms of accident compensation.

### 6. The Future of American Tort Law

American tort law is not what it was yesterday, and not what it will be tomorrow. Particularly in the field of torts, the law is never static. At the beginning of the twenty-first century, the battle over the terms and availability of accident compensation is being waged as fiercely as at any time

① See Daniel R. Deja, *How Judges Are Selected: A Survey of the Judicial Selection Process in the United States*, 75 Mich. B. J. 904, 904. (1996) ("Four primary methods are used to select judges in the United States: gubernatorial appointment, gubernatorial appointment with retention election, partisan election and nonpartisan election")

② See Wayne E. Green, *Texas Businesses Play Judicial Politics-Their Objective Is to Shape The High Court*, Wall St. J., Sept. 12, 1988, available in Westlaw at 1988 WL-WSJ 446233:

Getting the right judges on the state Supreme Court has become serious business for Texas business. Fed up with losing court cases that expand the rights of plaintiffs to sue and collect high-dollar damages, the business community has decided to try to eliminate the judges who vote that way and replace them with judges who think as they do. So after years of ignoring Supreme Court elections, business groups are weighing in with money, endorsements, get-out-the-vote campaigns and political messages designed to show that the court is hurting the Texas economy with anti-business decisions.

in American history. As always, the stakes are high. How the balance is struck will determine many things, including whether injured persons will be afforded relief, whether products will be safe, whether business will be competitive, and whether entrepreneurs will be free to pursue new horizons unchilled by the specter of tort liability.

In defining the terms of tort law, each generation must strike a balance that comports with its notions of social justice. Consideration must be given to competing ideas, such as personal independence and individual responsibility, on one hand, and communal interdependence and social accountability, on the other.

There are many things wrong with the American tort system, and they should of course be addressed in a precise and thoughtful fashion. However, one should not lose sight of the fact that in America at the beginning of the twenty-first century life is relatively safe from risks of accidental harm, and that the victims of the accidents that do occur have a reasonably fair chance of obtaining redress. American tort law-as shaped the expansion and reform of liability concepts during the past hundred years-bears a measure of credit for this enviable situation.